

1 THE HONORABLE RICHARD A. JONES
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 LYNN D. HOOKS and IDA P. HOOKS,) Case No. 2:12-cv-00708-RAJ
11 v.) Plaintiffs,) DEFENDANTS' MOTION TO
12 BANK OF AMERICA; AMERICA'S) DISMISS
13 WHOLESALE LENDER; and MORTGAGE) NOTE ON MOTION CALENDAR:
14 ELECTRONIC REGISTRATION SYSTEMS) MAY 18, 2012
(MERS),
15 Defendants.)

Defendants.)

16 I. INTRODUCTION

17 Plaintiffs Lynn D. and Ida P. Hooks ("Borrowers" or "Plaintiffs") bring this action
18 against Defendants Bank of America, N.A., as successor by merger to BAC Home Loans
19 Servicing, LP (erroneously sued as "Bank of America") ("BANA"), Countrywide Home
20 Loans, Inc., d/b/a America's Wholesale Lender ("AWL"), and Mortgage Electronic
21 Registration Systems, Inc. ("MERS") (collectively, "Defendants"). Borrowers seek, among
22 other things, to declare the Deed of Trust they executed null and void.
23

24 Borrowers do not dispute that they received the benefits of their loan (*i.e.*, use and
25 enjoyment of the property for more than seven years). Instead they seek to avoid further
26 payments and challenge any future foreclosure proceedings on the grounds that Defendants
27 lack any authority to foreclose or any interest in the Deed of Trust or Note, claiming that

1 Defendant BANA is solely the servicer of the loan and Defendant MERS lacks any authority to
 2 make any assignments. These allegations fail because they are contradicted by the judicially
 3 noticeable documents, do not allege sufficient facts to state a claim, and rely on
 4 misinterpretations of settled principles of law. Borrowers simply have not stated a viable claim
 5 against Defendants for at least the following reasons:

- 6 • Borrowers' claims based on a potential future foreclosure are not ripe and seek
 7 relief that is unavailable under the statute;
- 8 • Borrowers do not allege a violation of the Washington Deed of Trust Act; and
- 9 • Borrowers cannot quiet title where there are no competing interests and the
 10 outstanding debt is still owing.

11 Accordingly, Defendants request that the Court dismiss Borrowers' Complaint in its
 12 entirety and with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

13 **II. FACTS**

14 On or about December 1, 2004, Borrowers obtained a \$220,800 mortgage loan (the
 15 "Loan") secured by a Deed of Trust to finance real property located at 5140 South Leo Street,
 16 Seattle, Washington 98178 (the "Property"). Compl., Ex. D (Deed of Trust). The Deed of
 17 Trust ("DOT") securing the Loan to the Property identifies America's Wholesale Lender as the
 18 lender ("AWL"), Fidelity National Title Company of Washington ("Fidelity") as the Trustee,
 19 and Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee the lender and
 20 lender's successors and assigns. *Id.* By document recorded May 10, 2011, MERS assigned its
 21 beneficial interest under the Deed of Trust to The Bank of New York Mellon, FKA The Bank
 22 of New York, as trustee for the certificateholders of the CWMBS Inc., CHL Mortgage Pass-
 23 Through Trust 2005-07, Mortgage Pass-Through Certificates, Series 2005-007 ("BONY").
 24 Compl., Ex. E (Assignment of Deed of Trust).

25 Borrowers initiated the instant action against Defendants on March 16, 2012. On
 26 April 23, 2012, BANA removed the matter to this Court. The primary allegations in the
 27 Complaint maintain that Defendants lacks any interest in the Property and accordingly lack any

1 authority to initiate any future foreclosure; Defendants cannot produce the wet ink note; and
 2 that the Note and Deed of Trust are irreparably split. *See generally* Compl., pp. 2-11.¹

3 III. EVIDENCE RELIED UPON

4 This Motion to Dismiss relies upon the allegations in the Complaint and the undisputed
 5 recorded documents, of which the Court may take judicial notice.²

6 IV. ISSUE

7 Whether the Court should dismiss the Complaint in its entirety for failure to state a
 8 claim upon which relief can be granted.

9 V. ARGUMENT

10 A. Legal Standard

11 Federal Rule of Civil Procedure 8(a)(2) requires plaintiffs to provide ““a short and plain
 12 statement of the claim showing that [they] . . . [are] entitled to relief,’ in order to ‘give the
 13 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Bell Atl.*
 14 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This requires that a complaint contain sufficient
 15 factual allegations, which, accepted as true, state a claim for relief ““that is plausible on its
 16 face[.]”” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

17 To survive a motion to dismiss under Rule 12(b)(6), Plaintiffs must provide more than
 18 just “labels and conclusions.” *Twombly*, 550 U.S. at 555 (“formulaic recitation of the elements
 19 of a cause of action will not do[.]”). And while “a court must accept as true all of the
 20 allegations contained in a complaint is inapplicable to legal conclusions” [*Iqbal*, 129 S. Ct. at

21
 22 ¹ Borrowers have not numbered the pages of the Complaint; however, they have provided line numbers.
 23 Accordingly, Defendants will refer to the pages within the Complaint in the order provided along with the line
 24 numbers indicated.

25
 26 ² The Court may take judicial notice of publicly recorded documents and may consider the documents without
 27 turning this motion into a motion for summary judgment. *See, e.g., Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th
 Cir. 1995); *see United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (court may consider documents to
 which the complaint “refers extensively” or “form the basis of the Borrower’s claim”); *Parrino v. FHP, Inc.*, 146
 F.3d 669, 707 (9th Cir. 1998) (“A court may consider evidence on which the complaint ‘necessarily relies’ if:
 (1) the complaint refers to the document; (2) the document is central to the Borrower’s claim; and (3) no party
 questions the authenticity of the copy attached to the 12(b)(6) motion.”).

1 1949-50]; legal conclusions may establish the complaint's basic framework but "they must be
 2 supported by factual allegations." *Id.* at 1950. The Court ascertains the legal elements of a
 3 claim, and then determines whether, for the claim alleged, the facts pled show a "plausible
 4 claim for relief." *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009).

5 Here, as discussed below, Borrowers have not "nudged" their claims "across the line
 6 from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1951 (*citing Twombly*, 550 U.S. at 570).
 7 Accordingly, because no amendment will cure the deficiencies, the Court should grant
 8 Defendants' Motion to Dismiss with prejudice.

9 **B. Borrowers' Claims Are Not Ripe**

10 Borrowers seek to declare the Deed of Trust null and void and to declare the Note
 11 discharged based on what they deem improper actions of Defendants. Prayer for Relief,
 12 p. 13:3. They further seek to prevent any future foreclosure on the Property. Compl., p. 7:11-
 13 16. Borrowers' claims are all based on purported violations of the Deed of Trust Act; however,
 14 there are no foreclosure actions pending on the Property. Borrowers do not allege they have
 15 received a Notice of Default or any notice of any trustee sale. A review of the public record
 16 confirms foreclosure proceedings have not been initiated. Borrowers' claims regarding
 17 wrongful foreclosure are not ripe and cannot be sustained as a matter of law. Accordingly,
 18 these claims should be dismissed.³

19 **C. Borrowers Cannot Quiet Title in Their Name**

20 Borrowers' Complaint requests that the Court quiet title in their favor (Compl., pp. 5-
 21 11). Borrowers' claims fail as a matter of law. Quiet title actions are "designed to resolve
 22 competing claims of *ownership*...[or] *the right to possession* of real property." *Kobza v.*
 23 *Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001) (emphasis added). But Defendants here do not
 24 assert title in the Property. Rather, they only assert a security interest. The Washington statute

25
 26 ³ It is difficult to discern what relief Borrowers seek with their claims. To the extent they may be seeking relief
 27 under 61.24.130, their Complaint is both premature and noticeably devoid of any offer to post security as required
 by that statute.

1 governing quiet title actions recognizes that deeds of trust and mortgages create only secured
 2 liens on real property, and do not convey any ownership interest or right to possession of the
 3 subject property. *See RCW 7.28.230(1)* (“A mortgage of any interest in real property shall not
 4 be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the
 5 real property, without a foreclosure and sale according to law”); *State v. Superior Court for*
 6 *King County*, 170 Wn. 463, 467, 16 P.2d 831 (1932).

7 Consequently, because Defendants do not assert a claim to ownership of the Property
 8 but only a security interest therein, they cannot be proper defendants to a quiet title action and
 9 should be dismissed from such a suit. *See, e.g., Eason v. IndyMac Bank, FSB*, 2010 U.S. Dist.
 10 LEXIS 33806 (D. Ariz. 2010) (dismissing defendant MERS from a foreclosure related quiet
 11 title action because the plaintiff did not allege it claimed title interest in the property); *Walters*
 12 *v. Fid. Mortg. Co. of Cal.*, 2010 U.S. Dist. LEXIS 36839 (E.D. Cal. 2010).

13 To the extent that Borrowers do not seek to quiet title to the Property but asks the Court
 14 to judicially release them from their Deed of Trust—*i.e.*, give them a free house at Defendants'
 15 expense – Borrowers' request must be denied. To maintain a quiet title action against a
 16 mortgagee, a plaintiff must first pay the outstanding debt on which the subject mortgage is
 17 based. *See Evans v. BAC Home Loans Servicing LP*, No. c10-0656-RSM, 2010 WL 5138394,
 18 at *3 (W.D. Wash. 2010) (“Plaintiffs cannot assert an action to quiet title against a purported
 19 lender without demonstrating they have satisfied their obligations under the Deed of Trust.”).
 20 In *Evans*, Judge Martinez explained why a Plaintiff may not use a quiet title action to void a
 21 lien:

22 The logic of such a rule is overwhelming. Under a deed of trust, a borrower's
 23 lender is entitled to invoke a power of sale if the borrower defaults on its loan
 24 obligations. As a result, the borrower's right to the subject property is
 25 contingent upon the borrower's satisfaction of loan obligations. . . it would be
 26 unreasonable to allow a borrower to bring an action to quiet title against its
 27 lender without alleging satisfaction of those loan obligations.

28 *Id.* at *4.

1 Accordingly, the quiet title action is an improper vehicle to challenge Defendants'
 2 interest in the Deed of Trust.

3 **D. Borrowers Fails to State a Plausible Claim for Violation of the Deed of Trust Act**

4 Borrowers' overriding allegations are seeking to avoid their obligations under the Note
 5 and Deed of Trust and to prevent any future foreclosure actions. Borrowers, however, have
 6 failed to identify any wrongful conduct or prejudice to themselves. In their Complaint,
 7 Borrowers allege numerous violations of the Washington Deed of Trust Act ("DTA").
 8 Specifically, Borrowers allege that (1) BANA lacks the authority to enforce the Note or Deed
 9 of Trust (Compl. pp. 5:13-14, 23-25, 6:11-13); (2) MERS is not a proper beneficiary (*id.*, pp.
 10 4:35-37; 7:39; 8:1, 9-17); (3) the Deed of Trust and Note were split (*id.*, p. 4:37);
 11 (4) Defendants do not hold the note and therefore, lack standing to foreclose (*id.*, p. 3:18-19);
 12 and (5) a "robosigner" improperly signed the assignment of the beneficial interest in the Deed
 13 of Trust (*id.*, p. 4:29-32). Borrowers' claims cannot be sustained for the following reasons:

14 1. Judicially Noticeable Documents Demonstrate Defendants' Ability to Enforce
 15 the Terms of the Deed of Trust

16 Borrowers allege that BANA is not the real party in interest and cannot enforce the
 17 Note or Deed of Trust. Compl., pp. 5:13-14, 23-25, 6:11-13. However, the judicially
 18 noticeable documents indicate that none of these claims allege a plausible violation of the
 DTA.

19 It is undisputed that Borrowers executed a Deed of Trust that contains a power of sale
 20 identifying AWL as Lender and MERS as beneficiary in 2004. Compl., Ex. D. The Deed of
 21 Trust was recorded on December 8, 2004. MERS later assigned its interest under the Deed of
 22 Trust to BONY. *Id.*, Ex. E. Washington does not require that all assignments of the Deed of
 23 Trust be recorded in the County records each time the note is transferred or servicing rights are
 24 transferred. Thus a lack of recordings is not per se evidence of lack of ownership. Nor is it
 25 evidence of damage to Borrowers.

1 Washington law defines “beneficiary” under a deed of trust as the holder of the
 2 instrument or document evidencing the obligations secured by the deed of trust. *See* RCW
 3 61.24.005(2). *See also Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co.*, 88 Wn. App.
 4 64 (1997). It is well-settled case law that “transfer of the note carries with it the security,
 5 without any formal assignment or delivery, or even mention of the latter.” *Carpenter v.*
 6 *Longan*, 16 Wall. 271, 83 U.S. 271, 275, 21 L.Ed. 313 (1872); *see In re Leisure Time Sports,*
 7 *Inc.*, 194 B.R. 859, 861 (9th Cir. BAP 1996) (*citing Carpenter*). Indeed, the purpose of
 8 recording an assignment is to put parties who subsequently purchase an interest in the property
 9 on notice of which entity owns a debt secured by the property. RCW 65.08.070. Such
 10 assignments do not affect the rights of a borrower. *In re United Home Loans*, 71 B.R. 885,
 11 891(W.D. Wash. 1987), *aff'd* 876 F.2d 897 (9th Cir. 1989) (“assignment of a deed of trust and
 12 note is valid between the parties whether or not the assignment is ever recorded”; “Recording
 13 of the assignments is for the benefit of third parties”). Regardless, here, the interest was in fact
 14 recorded.

15 Additionally, BANA was the servicer of the Note. Pursuant to the Deed of Trust
 16 Borrowers executed, the servicer is defined as “[the] entity that collects periodic payments due
 17 under the Note and this Security Instrument and performs other mortgage loan servicing
 18 obligations under the Note, this Security Instrument, and Applicable Law.” Compl., Ex. D,
 19 ¶20. Accordingly, BANA was the servicer of the loan, authorizing it to collect payments and
 20 act in enforcing the terms of the Deed of Trust. Borrowers fail to allege any facts to the
 21 contrary.

22 2. MERS’ Role is Proper

23 Borrowers generically challenge MERS’ role claiming it is an improper beneficiary and
 24 cannot assign any interest in the Note or Deed of Trust. Compl., pp. 4:35-37; 7:39; 8:1, 9-17.
 25 These allegations directly contradict the express terms of the DOT, which Borrowers executed,
 26 as well as numerous holdings of this Court, which demonstrate that MERS is a valid
 27 beneficiary and can assign its beneficial interest.

1 In December 2004, the Borrowers executed a DOT identifying MERS as the beneficiary
 2 and nominee of the Lender and Lender's Successors and Assigns. Compl., Ex. D. By
 3 executing the DOT, Borrowers expressly consented to MERS' role in the transaction:

4 The beneficiary of this Security Instrument is MERS (solely as nominee for
 5 Lender and Lender's successors and assigns) and the successors and assigns of
 6 MERS. . . . Borrower understands and agrees that MERS holds only legal title to
 7 the interests granted by Borrower in this Security Instrument, but, if necessary to
 8 comply with law or custom, MERS (as nominee for Lender and Lender's
 9 successors and assigns) ***has the right: to exercise any or all of those interests,
 10 including, but not limited to, the right to foreclose and sell the Property; and
 11 to take any action required of Lender[.]***

12 Compl. Ex. D at 2-3 (emph. added). Accordingly, the Borrowers agreed to MERS' role as
 13 beneficiary under the DOT and MERS' right to act with respect to their Loan. Nothing in the
 14 Complaint offers a plausible challenge of the authority that was expressly granted in
 15 Borrowers' contractual agreement.

16 Thus, by the plain language of the Deed of Trust, MERS possessed the authority to
 17 assign beneficial interest to BONY. *Id.* Absent an unlawful purpose, parties are free to
 18 contract as they wish. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d
 19 318, 322 (2009) ("It is black letter law of contracts that the parties to a contract shall be bound
 20 by its terms."); *Patton v. City of Bellingham*, 38 P.2d 364 (Wash. 1934) (Parties "are free to
 21 make any contracts they choose for a lawful purpose"). Deeds of trust are subject to all laws
 22 relating to mortgages on real property. RCW 61.24.020. And Washington law specifically
 23 provides that "parties may insert in such mortgage any lawful agreement or condition." RCW
 24 61.12.020. MERS agreed to be designated, and was designated, by both Borrowers and the
 25 lender to act on behalf of the lender in the express capacity outlined in the Deed of Trust
 26 contract. Borrowers allege no facts whatsoever to negate this designation of MERS.

27 MERS' role in transactions similar to the one at issue here are permissible. *See Cebrun
 28 v. HSBC Bank USA, N.A.*, No. C10-5742BHS, 2011 WL 321992, at *3 (W.D. Wash. 2011)
 29 ("[Plaintiffs'] claims regarding MERS not being a beneficiary under the security instrument
 30 [are] without merit. . . . the Cebruns acknowledge that 'MERS is the beneficiary under this
 31

1 Security Instrument.’ [as dictated by the terms of the Deed of Trust they affixed to their
 2 Complaint]”). Indeed, this Court has repeatedly acknowledged the express appointment of
 3 MERS in other trust deeds.

4 In *Daddabbo v. Countrywide Home Loans, Inc.*, No. C09-1417-RAJ, 2010 WL
 5 2102485 (W.D. Wash. May 20, 2010), this Court found MERS to be a proper Deed of Trust
 6 beneficiary despite the fact that MERS was not also the note holder. *Id.* at 5. Reviewing trust
 7 deed language similar to that contained in the instant Deed of Trust, the Court held that “the
 8 deed of trust, of which the court takes judicial notice, explicitly names MERS as beneficiary.
 9 The deed of trust grants MERS not only legal title to the interests created in the trust, but the
 10 authorization of the lender and any of its successors to take any action to protect those interests,
 11 including the right to foreclose and sell the Property.” *Id.* (internal citations omitted).

12 In *Vawter v. Quality Loan Serv. Corp. of Wash.*, No. C09-1585JLR, 707 F. Supp. 2d
 13 1115 (W.D. Wash. 2010), this Court granted judgment on the pleadings to the defendants
 14 where the plaintiffs alleged that “MERS[’] assignment of its beneficial interest to [the
 15 Defendant] had no actual effect because MERS had no interest to assign.” *Id.* at 1125. The
 16 Court held that “[plaintiffs’] assertion that MERS does not ever acquire a beneficial interest in
 17 mortgage loans is a legal conclusion rather than a factual allegation,” and insufficient to survive
 18 a motion for judgment on the pleadings. *Id.* at 1126. *But see Bain v. OneWest*, No. C09-0149-
 19 JCC (W.D. Wash. March 15, 2011) (questioning MERS’ role as beneficiary and certifying the
 20 issue to the Washington Supreme Court).

21 While questions regarding MERS’ role as beneficiary are currently pending before the
 22 Supreme Court in the case of *Bain, supra*, the clear weight of legal authority in Washington, as
 23 set forth above, supports a finding that MERS is authorized to act. In particular, Courts in
 24 Washington have recently upheld MERS’ role where, as here, MERS’ sole role in the
 25 foreclosure transaction is assigning interests in the Deed of Trust. Judge Overstreet recently
 26 distinguished situations where MERS’ role in foreclosure is limited to merely transferring its
 27 interest in *Reinke v. Northwest Trustee Services, Inc.*, Case No. 09-19609/Adv. No. 09-01541

1 (W.D. Wash. Bankr.), slip op. dated October 26, 2011. In that case, Judge Overstreet adopted
 2 the holding of *Cervantes*⁴ and rejected plaintiffs' attempt to invalidate the security instrument
 3 through generic MERS allegations:

4 This is not a case where the foreclosures were brought by MERS in its own
 5 name. Consequently, the Court rejects Plaintiff's contention that the . . . Notes
 6 are unsecured merely because MERS acted in the role of nominee for the
 7 lenders under the terms of the deeds of trust . . . The only acts taken by MERS in
 8 relation to foreclosure were to execute assignments of its interest in the two
 9 deeds of trust . . .

10 Slip op. at p. 17.

11 Finally, Borrowers are estopped from asserting that the agreement is invalid. *Simonds*
 12 *v. Noland*, 253 P. 638 (1927) (where a contract is not against public policy, a party is estopped
 13 from denying its terms); *Seattle, R. & S. Ry. Co. v. Seattle-Tacoma Power Co.*, 116 P. 289
 14 (1911) (where parties contract to use a certain method of recording power usage, railway
 15 cannot be heard to say the method is improper). Here the Borrowers have shown no legal or
 16 factual reason why the agreement in the deed of trust should be disturbed in this contract or in
 17 millions of other contracts. There is no allegation that the agreement is for an unlawful
 18 purpose; there is no allegation of unconscionability; there is not even an allegation as to how
 19 the contract provision caused them harm. Borrowers knowingly signed the deed of trust, and
 20 the designation of MERS in the deed of trust is clear. Even if it were not, “[w]here there is any
 21 doubt about the meaning of words used in a deed, it is to be resolved against the grantor.” *Carr*
 22 *v. Burlington Northern, Inc.*, 597 P.2d 409, 411 (Wash. Ct. App. 1979). Thus, Borrowers are
 23 estopped from denying the agreement to designate MERS as beneficiary of the deed of trust, as
 24 nominee for the lender and lender's successors and assigns. Instructive here is the Ninth
 25 Circuit Court of Appeals' determination in *Cervantes, supra*. There, the Court examined the
 26 role of MERS as beneficiary in deeds of trust and specifically rejected the borrowers “MERS is
 27 a sham beneficiary” allegation where it was apparent that the Deed of Trust explicitly identified

⁴ *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1042 (9th Cir. 2011) (applying Arizona contract law) (“By signing the deeds of trust, the plaintiffs agreed to the terms and were on notice of the contents.”).

1 MERS' role and authority, which the borrowers then executed. *Id.* at 1042 (applying Arizona
 2 contract law).

3 For all these reasons, Borrowers' conclusory challenge as to MERS is without merit and
 4 not likely to succeed on the merits.⁵

5 3. Borrowers Fail To Plead Separation of the Note and Deed of Trust

6 Borrowers contends that “[w]hen the mortgage/deed of trust have been assigned without
 7 the note, then the assignment is one in which the note has no security.” Compl., p. 4:37. In
 8 recent case law, this theory has come to be known as the “split the note theory.” *See In re*
 9 *MERS*, 2011 WL 251453 (D. Ariz. January 25, 2011) (identifying the “split the note theory”
 10 and rejecting it as a basis for quiet title, slander of title, and unjust enrichment).

11 The fatal problem with this theory is that it ignores the fact that when a note secured by
 12 a deed of trust is assigned, the deed of trust follows the note (in the legal if not physical sense).
 13 Restatement (Third) of Property (Mortgages) § 5.4 (a)(1997) (“A transfer of an obligation
 14 secured by a mortgage also transfers the mortgage unless the parties to the transfer agree
 15 otherwise.”).

16 Here, the Deed of Trust clearly identifies MERS as a beneficiary, as “nominee of
 17 Lender and Lender’s Successors and Assigns.” Compl., Ex. D. Therefore, MERS acts as
 18 beneficiary in an agency capacity for the original lender and each subsequent lender (note
 19 owner) and each time the note is sold MERS becomes agent for a new principal. Thus, there
 20 could be no separation of the note and deed of trust where MERS or the assignee of the Deed of
 21 Trust, BONY possessed its interest subject to the interests of the Lender. *See Cervantes v.*
 22 *Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011) (“the notes and deeds are not
 23 irreparably split: the split only renders the mortgage unenforceable if MERS or the trustee, as

24
 25 ⁵ Defendants disagree with Borrowers’ challenge of MERS, but acknowledge that the question of MERS’ standing
 as beneficiary is currently pending before the Supreme Court. *See Bain v. OneWest*, No. C09-0149-JCC (W.D.
 Wash. 2011). Accordingly, Defendants request that, should this Court reach the conclusion that a determination of
 the viability of Borrowers’ claims necessitates first that a final resolution of MERS’ ability to act as beneficiary,
 that the MERS based claims be stayed until a decision is reached by the Supreme Court.

1 nominal holders of the deeds, are not agents of the lenders.”). Borrowers’ Complaint offers no
 2 grounds to negate the basic agency relationship established by the Deed of Trust they executed.
 3 Accordingly, there is simply no merit to Borrowers’ theory that the Deed of Trust and Note
 4 were separated.

5 4. There is No Requirement to Produce the Original Note

6 Borrowers’ allege that Defendants cannot produce the original wet ink Note. Compl.,
 7 p. 3:18-19. However, Washington appellate courts have repeatedly held that the DTA does not
 8 require a lender to produce the original Note as a condition of the non-judicial foreclosure. *See,*
 9 *e.g., Broaught v. Tarabochia*, 104 Wn.App. 728, 731-35 (2001) (enforcing Note despite failure
 10 to produce the original). The federal courts likewise have rejected the “show me the Note”
 11 argument. *See Vawter v. Quality Loan Service Corp. of Washington*, 707 F. Supp. 2d 1115
 12 (W.D. Wash. 2010); *Diessner v. Mortgage Electronic Registration Systems*, 618 F. Supp. 2d
 13 1184, 1187 (D. Ariz. 2009) (collecting cases); *Freeston v. Bishop, White & Marshall*, 2010 WL
 14 1186276 (W.D. Wash. 2010); *Wallis v. IndyMac Fed. Bank*, 2010 WL 2342530, *5 (W.D.
 15 Wash. 2010).

16 Accordingly, Borrowers cannot challenge Defendants’ ability to enforce the Loan terms
 17 on the basis of Defendants’ failure to furnish them with the original Note. To the extent the
 18 Complaint makes assertions to the contrary, such claims should be dismissed with prejudice.

19 5. Any Unpled RESPA Claim Fails as a Matter of Law

20 Borrowers also allege that they sent at least two requests pursuant to the Real Estate
 21 Settlement Procedures Act (“RESPA”) requesting to obtain the “original wet ink signature to
 22 establish proof of claim[.]” Compl., pp. 3:17-19, 24-26. However, Borrowers have not raised a
 23 claim pursuant to RESPA. Even if they had raised such a claim, certain requirements must be
 24 met. Where a borrower has specific questions or disputes relating to the servicing of a loan,
 25 RESPA provides the opportunity to issue a written request to the loan’s servicer. The statute
 26 requires the servicer to acknowledge receipt of the QWR and respond within a specified
 27 number of days. 12 U.S.C. § 2605(e). To constitute a QWR, the request must relate to loan

1 servicing. *See Kelly v. U.S. Bank*, 2010 WL 4135028, at *13 (D. Or.) (QWRs must relate to the
 2 servicing of the loan); *Thayne v. Taylor, Bean & Whitaker Mortgage Corporation*, 2010 WL
 3 3546929, at *3 (D. Utah Sept. 10, 2010) (QWRs relate only to the servicing of the loan). The
 4 term “servicing” refers to “receiving any scheduled periodic payments from a borrower
 5 pursuant to the terms of any loan[.]” *Id.* § 2605(i)(3). “Courts routinely interpret section 2605
 6 as requiring a QWR to relate to the servicing of the loan, rather than the creation or
 7 modification of a loan.” *Gates v. Wachovia Mortg., FSB*, No. 09-02464, 2010 WL 2606511,
 8 *3 (E.D. Cal. June 28, 2010). *See also Lucero v. Diversified Investments Inc.*, 2010 WL
 9 3463607, at *1, *4 (S.D. Cal. Aug. 31, 2010) (QWRs are requests relating to servicing “like the
 10 outstanding amount due or the interest rate”); *Lopez v. U.S. Bank National Association*, 2010
 11 WL 3463622, at *1 (S.D. Cal. Aug. 31, 2010) (noting that QWRs are requests relating to
 12 servicing, “like the outstanding amount due or interest rate” or “for purposes of challenging an
 13 amount due or try to correct an error by the loan servicer”).

14 Moreover, a QWR must include “a statement of the reasons for the belief of the
 15 borrower . . . that the account is in error or provide[] sufficient detail to the servicer regarding
 16 other information sought by the borrower.” *See* 12 U.S.C. § 2605(e)(1)(B); *see also Pettie v.*
Saxon Mortg. Services, No. 08-5089, 2009 WL 1325947, at *2, fn. 3 (W.D. Wash. 2009);
Walker v. Equity 1 Lenders Group, No. 09-325, 2009 WL 1364430, at *4-5 (S.D. Cal. 2009).
 19 A request that is a “general notice of inquiry” and merely seeks documentation without
 20 reflecting a belief by the borrower that his account is in error does not constitute a QWR.
Eifling v. Nat'l City Mortg., et. al., No. CV10-5713 RBL, 2011 WL 893233, at *2-3 (W.D.
 21 Wash. 2011). “The RESPA and the QWR regulation was not designed, and should not be used,
 22 as a vehicle to permit in default borrowers to flood their lender with documentation requests, on
 23 the hope that a failure to timely comply will lead to an affirmative cause of action. . . .” *Id.* at
 24 *3 (emphasis added).

26 Here, there are no allegations of servicing violations yet alone any claim for damages as
 27 required by RESPA. 12 U.S.C. § 2605(f)(1)(A) (“Whoever fails to comply with any provision

of this section shall be liable to the borrower for * * * any actual damages to the borrower as a result of the failure * * *.); *see also Thayne*, 2010 WL 3546929, at *3 (dismissing complaint where plaintiff failed to plead sufficient facts that he suffered actual damages as a result of the servicer's alleged failure to comply with RESPA); *Bishop v. Quicken Loans, Inc.*, 2010 WL 3522128, at *6 (S.D. W. Va. Sept. 10, 2010) (finding plaintiffs' conclusory allegations that they suffered "financial loss, annoyance and inconvenience" insufficient to plead "actual damages"); *Copeland v. Lehman Brothers Bank*, FSB, 2010 WL 2817173, at *3-4 (S.D. Cal. July 15, 2010) (holding that § 2605 requires a showing of pecuniary damages to state a claim); *Lucero*, 2010 WL 3463607, at *4 (plaintiff must suffer actual damages in order to recover under § 2605(e)); *Durland v. Fieldstone Mortgage Co.*, 2010 WL 3489324, at *4 (S.D. Cal. Sept. 3, 2010) (court dismissed plaintiff's RESPA complaint after determining that plaintiff failed to allege specific facts to support how defendant's alleged failure to respond to plaintiff's QWRs resulted in pecuniary damages); *Hutchinson v. Delaware Savings Bank FSB*, 410 F. Supp. 2d 374, 383 (D. N.J. Jan. 25, 2006) ("Plaintiffs must, at a minimum, also allege that the breach resulted in actual damages."). Borrowers have not demonstrated that they met such requirements.

6. Borrowers' Robo-Signer Allegations Cannot be Sustained

Borrowers make the bare and conclusory allegation that "King County Recorder's office for the Assignment of Deed of Trust revealed ROBO signatures on the said agreement . . . This clearly shows that the Assignment of the Deed of Trust is a fabrication." Compl., p. 4:27-32. Despite their challenge to the assignment, Borrowers lack standing to make such a challenge. Borrowers are not a party to the assignment nor are they intended third party beneficiaries, so that MERS could not have made any misrepresentation concerning the assignment. This claim fails on that basis alone.⁶ Even if Borrowers had standing—which they

⁶ Although not specifically addressed by Washington Court's, in *Livonia Property Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC*, 2010 WL 1956867 (E.D. Mich. 2010), the Court determined that the Borrower lacked standing as they were not a party to any assignment. More recently, in *Jenkins v. McCalla Raymer, LLC*, No. 1:10-cv-03732 (N.D. Ga. August 31, 2011), the Court determined that Borrower was not a party to the assignment, so that MERS could not have made any misrepresentations concerning the assignment. Similarly, an

1 do not—although Borrowers characterize Luis Roldan, who signed on behalf of MERS, as a
 2 robosigner, Borrowers fail to set forth any *facts* or *law* that would render the Assignment void.
 3 Merely branding an individual as a “robosigner” is not commensurate with alleging facts that
 4 evidence any wrongdoing by Defendants. Borrowers simply do not explain how their
 5 allegation, without more, amounts to a DTA violation.

6 Regardless, the Assignment of Deed of Trust is notarized. Under Washington law,
 7 notaries “determine and certify,” based on “personal knowledge or satisfactory evidence,” that
 8 the person making an acknowledgement or verification upon oath or affirmation “is the person
 9 whose true signature is on the document.” RCW 42.44.080(1), (3).⁷ The notary’s affirmation
 10 of personal knowledge or proof of identity of the person signing the document establishes
 11 “prima facie evidence of the facts recited therein.” RCW 64.08.050. Accordingly, to the extent
 12 Borrowers’ claims are based on their robosigning allegations, they fail.

13 VI. CONCLUSION

14 For all these reasons, Borrowers’ Complaint fails to state a single viable cause of action
 15 against Defendants. It is clear that no amendment can cure the Complaint’s deficiencies.

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24 Oregon Court, made the same determination. *See Schlesinger v. ReconTrust Company*, No. 16-11-22098 (Lane
 25 County Circuit Court, January 24, 2012). Accordingly, Borrowers lack standing to challenge the assignment and
 26 this claim fails on that basis alone.

27 ⁷ A notary is determined to have such “satisfactory evidence” of identification if the person is either personally
 known to the notary, identified upon oath or affirmation of a credible witness personally known to the notary, or
 “identified on the basis of identification documents.” RCW 42.44.080(8).

1 Therefore, Defendants respectfully request that the Court dismiss the Complaint with prejudice
2 pursuant to Federal Rule of Civil Procedure 12(b)(6).

3 DATED: April 26, 2012

4 LANE POWELL PC

5
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N.A., as successor by merger to BAC Home
11 Loans Servicing, L.P. (erroneously sued as
12 "Bank of America"); Countrywide Home
13 Loans, Inc., d/b/a America's Wholesale
Lender; and Mortgage Electronic Registration
14 Systems, Inc.

CERTIFICATE OF SERVICE

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 26th day of April, 2012, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system. I further certify that on the date indicated below I caused the foregoing document to be served on the following non-ECF participant via Federal Express overnight delivery:

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Executed on the 26th day of April, 2012, at Seattle, Washington.

s/ Danna Hutchings
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